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IN THE

Supreme Court of the United States

October Term, 19_____

No._____

ROBERT ELI STANLEY,

Appellant

vs.

THE STATE OF GEORGIA,

Appellee

JURISDICTIONAL STATEMENT

REPORT OF OPINION OF COURT BELOW

The opinion of the Georgia Supreme Court in this case is officially reported in 224 Ga. 259 and unofficially reported in 161 S.E.2d, 309 and a copy thereof is appended to this jurisdictional statement.

CONCISE STATEMENT OF GROUNDS OF THIS COURT'S JURISDICTION

This was a criminal proceeding brought by the State of Georgia charging the appellant with a felony, possessing obscene material in violation of Georgia Code

26-6301 as amended by an Act of the General Assembly of 1963, p. 78.

The judgment of affirmance by the Supreme Court of Georgia sought to be reviewed was dated April 9, 1968, and an order denying a rehearing was dated and filed April 22, 1968. The notice of appeal was filed in the Supreme Court of Georgia May 1, 1968.

Jurisdiction of this appeal has been conferred on this court under and by virtue of 28 U.S.C.A. No. 1257 (2).

The cases believed to sustain the jurisdiction of this court are *Lovell v. City of Griffin, Georgia,* (1938) 303 U. S. 444, (82 L. Ed. 949, 58 S. Ct. 666); *Standard Oil Co. of California v. Johnson,* (1942) 316 U.S. 481 (86 L. Ed. 1611, 62 S. Ct. 1168); *Redrup v. N. Y., Austin v. Ky.* and *Gent v. Arkansas,* 386 U. S. 767 (87 S. Ct. 1414) and *Smith v. California,* 361 U. S. 147 (80 S. Ct. 215).

The validity of a statute of Georgia is involved in this appeal, to be found in Ga. Laws 1963, p. 78, and is set forth verbatim in an appendix to this jurisdictional statement.

QUESTIONS PRESENTED BY THE APPEAL

1. Whether Georgia Code section 26-6301 (Ga. Laws, 1963, p. 78), under which the appellant was convicted, is repugnant to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing freedom of press and due process in that the statute removes the element of scienter from the definition of the offense of possessing obscene matter, and makes the mere possession of such matter a crime.

2. Whether a search warrant issued by a U. S. Commissioner authorizing a search of premises for bookmaking

records and other wagering paraphernalia, founded on affidavits that the person's home sought to be searched has not registered as a gambler under the Wagering Tax Act, is invalid since the holding by this court in *Marchetti v. U. S.*, 88 S. Ct. 697 No. 2, Oct. Term, 1967, decided Jan. 29, 1968 and *Grosso v. U. S.* 88 S. Ct. 709 No. 12, Oct. Term, 1967, decided Jan. 29, 1968.

3. Whether the Supreme Court of Georgia erred in holding and deciding that the search warrant and the search conducted thereunder were legal.

4. Whether a state officer, acting in concert with federal agents executing a federal search warrant issued for failure to register as a gambler, were constitutionally authorized to seize motion picture films concealed in a desk drawer of appellant's home on a claim by the state officer that the films were obscene where such search warrant did not describe the films to be seized and there was no prior adjudication that they were obscene.

5. Whether a state may constitutionally punish an individual for the mere possession of films alleged to be obscene where there is no evidence to show the appellant had prior knowledge that they were obscene, or that he had ever viewed them, or that he had permitted juveniles to view them, or that he was publishing them in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or that he was "pandering" them.

CONCISE STATEMENT OF THE CASE

The appellant was indicted by the Fulton County Grand Jury for the offense of possessing obscene matter, to-wit: three reels of motion picture film. (R. 11-12)

Upon his arraignment he filed a general demurrer to the indictment on three grounds. (a) That the indictment failed to charge an offense; (b) that the Act of 1963, under which the indictment was drawn, offended the State Constitution; and (c) that the Act was in conflict with the First and Fourteenth Amendments to the U. S. Constitution in removing the element of scienter from the definition of the offense. The trial court, after hearing argument of counsel, overruled the demurrer on all grounds.

Appellant also filed a special demurrer to a portion of the indictment alleging that "accused should reasonably have known of the obscene nature of said matter," contending that it violated his First and Fourteenth Amendment rights by removing scienter from the offense. This demurrer was overruled by the court.

Both the general and special demurrers, and the orders of the trial court overruling them, are contained from pages 13 through 17 of the record.

Appellant filed a motion to suppress the three reels of film from evidence (R. 29-36) on the grounds they were seized from his home by an Investigator of the Criminal Court "without a lawful search warrant particularly describing said articles to be seized," and that "no prior adjudication had been made that said articles were obscene" in violation of his First and Fourteenth Amendment rights.

Evidence was heard by the trial court on this motion, at which time the State introduced in evidence a federal search warrant and supporting affidavits issued for the violation of the Federal Wagering Tax Act (R. 37-57) (R. 87). After argument of counsel the motion was overruled. (R. 22 and 23.)

The case proceeded to trial before a jury, and a verdict of guilty was returned and sentence of one year imposed. (R. 19 and 20.)

The evidence for the State consisted of testimony by federal agents and one state officer that they searched the appellant's home pursuant to the federal search warrant for the seizure of wagering paraphernalia. They found no such articles described in the warrant, but during the course of the search discovered the three reels of film described in the indictment concealed in a desk drawer of one of the bedrooms. They found a motion picture projector and a screen, ran the film and determined in their opinion they were obscene. The films were then seized, the appellant placed under arrest and the indictment and conviction followed.

The verdict of the jury was returned January 19, 1967, sentence pronounced Jan. 19, 1967 and motion for new trial filed the same day, (R. 21) and overruled Nov. 20, 1967.

Notice of appeal to the Supreme Court of Georgia was filed December 14, 1967 (R. 6 and 7). The appellant enumerated as error the overruling of the motion to suppress evidence, the overruling of the general demurrer to the indictment, the holding by the trial court in its rulings on the demurrers that the Act of the General Assembly under which the appellant was tried was constitutional and not in conflict with the First and Fourteenth Amendments to the United States Constitution; and that the evidence did not support the verdict in that the State failed to prove that appellant exhibited the alleged obscene films to any other person. (R. 286-289).

The unconstitutionality of the Act of 1963, p. 78,

under which appellant was convicted, was first raised in the trial court by the 3rd ground of the general demurrer (R. 14 and 15) and the special demurrer (R. 17) and were overruled by the trial court (R. 16 and 18), enumerated as error in the Georgia Supreme Court, (Grounds 2, 5, and 6, R. 286 and 287) passed on by the Georgia Supreme Court adversely to appellant in the 4th section of the opinion, (R. 295, 296 and 297) and motion for rehearing on this ground was made (R. 301 and 302, ground 3).

The invalidity of the search and seizure was first raised in the trial court by the motion to suppress prior to trial (R. 29-36), overruled by the trial court (R. 22 and 23), enumerated as error in the Georgia Supreme Court (R. 286) (Ground 1), and passed on by the Supreme Court of Georgia in Sec. 1 of the opinion (R. 290). A motion for rehearing of this ground was made (R. 299, 300 and 301, grounds 1 and 2).

The insufficiency of the evidence in failing to show that appellant had exhibited the films to an unwilling individual or a minor was raised in enumeration of error No. 8 in the Georgia Supreme Court, passed upon by that Court in Sec. 6 of its opinion (R. 297), and a motion for rehearing was made on this ground in par. 4 (R. 302).

GROUNDS UPON WHICH FEDERAL QUESTIONS ARE CONTENDED TO BE SUBSTANTIAL

1.

The main question presented by this appeal involves the validity of the Georgia obscenity statute and whether it violates the First and Fourteenth Amendments in authorizing a conviction for mere possession of articles contended to be obscene in removing the element of scienter from the definition of the offense by punishing a possessor on less evidence than it takes to prove actual knowledge of its obscene nature.

The reason why this question is so substantial as to require plenary consideration is that the Georgia statute permits a conviction for possessing obscene articles *"if the defendant should reasonably have known of the obscene nature of said matter"* and thus deprives the accused of his liberty even though he has no actual knowledge that it is obscene. Such statute thus places every citizen in jeopardy of punishment by the State for possessing matter of which he may not have actual knowledge, or for believing, as he has a right to under the freedom of press clause of the First Amendment, that in his opinion it is not obscene.

Such question is also so substantial as to require plenary consideration because it deprives a citizen of the right given by the First Amendment to judge for himself, if he so chooses, as to what photographs, writings or books he may possess in the privacy of his own home.

The case believed to sustain the jurisdiction of this court on this ground is

Smith v. California,
361 U. S. 147

wherein this court held that an ordinance, dispensing with the element of scienter, in a prosecution for possession of obscene articles, was unconstitutional as in conflict with the First and Fourteenth Amendments.

It was recognized in the Smith case that in other types of offenses, such as food and drug legislation, "the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors — in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used." However, the distinction was made because "there is not specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."

The United States Supreme Court there held that "by dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter."

If the State is prohibited, by the First and Fourteenth Amendments, from removing the element of scienter from the offense of selling or pandering obscene material, and is thus prohibited from punishing a bookseller for selling an obscene book where such seller has no actual knowledge of its contents, may the States prescribe any less a standard against those who are not charged with pandering, selling or distributing, but merely pos-

sessing the same material? To put the matter in converse, are the States to be prohibited from convicting a seller who has no knowledge of the contents of the book he is selling, but may the same State convict such seller of possessing the same book, even though he was without the same knowledge?

The indictment in this case charges the appellant with knowingly possessing obscene matter. It further charges that he should reasonably have known of the obscene nature of said matter. If he has been called upon to defend his actual knowledge, that is one thing. If he has been called upon to defend that he *should reasonably have known* of the obscene nature of said matter, that is another. If the State is able, by some sort of proof, direct or circumstantial, to show that the appellant *should reasonably have known* of the obscene nature of said matter, such proof could be adduced far short of proving the he actually *did know*. This removed the element of scienter, and thus took from the appellant the constitutional protection of the First and Fourteenth Amendments.

It would be virtually impossible for any person to have either actual knowledge that any matter is obscene, or could reasonably be expected to have such knowledge, without having actually or constructively *possessed* such matter beforehand. For an individual to have knowledge of the contents of a reel of film, or to reach a determination *of his own* that it is obscene, can be arrived at in only two ways. First, by viewing the film. Second, by having been told by another person that in his opinion it is obscene. Thus, in order to learn firsthand it would be necessary that one *possess* the film in order to see it, and thus discover for himself his own opinion of its contents. To obtain the opinion of another that such film is

obscene is to be deprived of the constitutional right to access of such picture, and thus be deprived of freedom of speech and press. Furthermore, the opinion of one man that a certain film is obscene may oftentimes not be shared by others. Consequently, in order for one to have knowledge of the contents of a film, or to make a determination for himself that it is obscene, necessarily requires its possession, and such possession has been made an offense under Georgia law.

Therefore, if A picks up a book at a newsstand or library, not knowing of its contents, he is in possession of it. If he reads it, in order to make a determination that it is actually constitutionally protected matter, and after reading it learns that it is obscene, he has violated the Georgia law because he has possessed it at the time he knows it to be obscene. Such a law is obviously unconstitutional, and can not stand. If he should only have reasonably known of the obscene nature of said matter, instead of actually having such firsthand knowledge, the unconstitutionality of such statute is further removed by one more degree.

On May 8, 1967, the United States Supreme Court decided three different cases at one time. *Redrup v. State of New York, Austin v. Kentucky,* and *Gent v. State of Arkansas,* 386 U. S. 767, 87 S. Ct., 1414, Nos. 3, 16 and 50, October Term, 1966. All three cases involved selling and offering obscene literature. All three cases were reversed on First and Fourteenth Amendment grounds. In a percuriam decision, the Supreme Court held:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. * * * In none was there any suggestion of an assault upon individual pri-

> vacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. * * * And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U. S. 463."

In the case at bar, the State has sought and is seeking, to deprive the appellant of his liberty upon the mere claim that he possessed, (apparently for his own use) three reels of film, contended by the State to be obscene, and that he either knew, or reasonably should have known, that they were obscene. No sale is alleged. No exhibition or attempted exhibition is alleged. No advertisement is alleged. No corruption of minors is alleged. No transportation is alleged. In fact, nothing is alleged to have been done by the appellant other than the fact that he did "possess" such matter.

The statute offends the Federal Constitution, and must be so declared.

The overruling of the general and special demurrer on these grounds was error, and such ruling should be reversed.

2.

The next question presented by this appeal is also substantial in that at the time the warrant was issued the Wagering Tax Act was being enforced under the authority of

United States v. Kahriger
345 U. S. 22
and
Lewis v. United States
348 U. S. 419

holding the statute to be constitutional.

The warrant was issued by the U. S. Commissioner on the probable belief that a lottery or wagering operation was being carried on at the residence of the appellant, and that inasmuch as sworn evidence was presented that appellant *had not registered or paid his tax as purportedly required* by federal law, a warrant should issue to require the seizure of such implements of gambling as might be found in use there.

On the 7th day of September, 1966, the date the warrant was issued and executed, the federal wagering tax act was being enforced.

However, as of this date of writing this jurisdictional statement both *Kahriger* and *Lewis* have been specifically overruled by the Supreme Court.

On January 29, 1968, two weeks after the appellant filed his original brief and enumeration of errors in the Georgia Supreme Court in this case, in the case of

> *Marchetti v. United States,*
> No. 2—Oct. Term, 1967 (36 U. S. Law Week, 4143)
>
> and
>
> *Grosso v. United States,*
> No. 12—Oct. Term, 1967 (36 Law Week 4150)

the United States Supreme Court held:

> "We conclude that nothing in the Court's opinions in *Kahriger* and *Lewis* now suffices to preclude petitioner's assertion of the constitutional privilege as a defense to the indictments under which he was convicted. To this extent *Kahriger* and *Lewis* are overruled."

In the latter cited case the unenforceability of the wagering tax act against one who has even the remotest right to claim the Fifth Amendment privilege was so strongly recognized as an inherent defense to such a charge that even the *failure of the petitioner to assert the claim of privilege was held not to constitute a waiver of the privilege.*

If, in the instant case, the Agent had seized wagering material as a result of the execution of the search warrant, a conviction based thereon would have fallen for the same reasons as those urged in *Marchetti* and *Grosso,* on the theory that appellant would not have been required to criminate himself by registering.

If, applying this same analogy to the validity of the search warrant, the appellant had registered as a gambler and paid his tax, there never would have been federal grounds for the issuance of the search warrant because he would obviously not have violated the federal statute by conducting a wagering operation. Consequently, having the constitutional right to exercise his Fifth Amendment protection by not registering as a gambler bars that same failure to register from being the basis for which a search warrant (the commencement of a prosecution) might validly issue.

The search warrant was therefore void, the seizure of the films were illegal, the finding of the trial court that as a matter of law the warrant was valid and the holding of the Georgia Supreme Court in division one of its opinion that the warrant and the search thereunder were legal, was erroneous under the Fourth and Fourteenth Amendments to the U. S. Constitution.

3.

The search and seizure question, while not an appealable question, is substantial and should be treated as a certiorariable question under 28 U.S.C.A. No. 2103.

Appellant, in his motion to suppress, alleged the films to have been seized *"without a lawful warrant."*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment Four of the United States Constitution.

Originally it was recognized by the Supreme Court of the United States in *Wolf v. People of State of Colorado,* (1949), 338 U.S. 25, that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable seizure." In *Mapp v. Ohio,* 367 U.S. 643, (1961), the Supreme Court overturned this theoretical principle of law, declaring that: "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

On the same day that *Mapp* was handed down by the Supreme Court the same principle was applied to the statutes of the State of Missouri as they authorized the search for and seizure of materials sought to be declared obscene. In *Marcus v. Search Warrants of Property,* 367

U. S. 717, the Supreme Court declared the Missouri statute to be in violation of the Due Process clause of the Fourteenth Amendment.

In *Marcus*, the appellants, owners of a newsstand where numerous books and periodicals had been seized by police officers under a warrant issued by a magistrate, moved to suppress the evidence because the procedures applied (1) "allowed a seizure by police officers 'without notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not these publications are obscene,' and (2) because they 'allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which magazines were obscene and were subject to seizure, impairing movants freedom of speech and publication'." The Supreme Court then determined that the question was "whether the use by Missouri in this case of the search and seizure power to suppress obscene publications involved abuses inimical to protected expression" and noted that the authority given to "police officers under the warrants issued in this case, broadly to seize 'obscene publications,' poses problems not raised by the warrants to seize 'gambling implements' and 'all intoxicating liquors' involved in the cases cited by the Missouri Supreme Court." The Supreme Court, after applying the foregoing principles, held:

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech."

In *Marcus*, the Supreme Court was dealing with even a stronger position insofar as the prosecution was con-

cerned. In *Marcus*, a search warrant had been obtained in the language of the statute and the complaint authorizing the police officers to seize such magazines as in his view constituted "obscene publications." In the case at bar no warrant had been obtained authorizing even this broad seizing power.

In *Marcus*, there was in existence a State statute specifically authorizing the issuance of such a warrant, and prescribing the procedure therefor. Such a warrant was obtained. In the case at bar the officer executing the search of the appellant's home did not seize any matter or thing called for by the warrant, but made a decision, *ad hoc*, that the three reels of film were obscene, without benefit of any prior adjudication by a court or the Literature Commission.

The appellant recognizes that if an officer, executing a valid search warrant, discovers evidence of another and different crime or sees what is known to be contraband, he may make a seizure, even though the warrant does not *particularly describe* the article being seized. However, as pointed out in the *Marcus* case, supra, the State court's "assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure does not therefore answer the appellants' constitutional claim, but merely restates the issue *whether obscenity may be treated in the same way*." (Emphasis added.)

In quoting from *Speiser v. Randall*, 357 U.S. 513, the Supreme Court reiterated in *Marcus* that "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for sensitive tools."

It is to be plainly noted in this case at bar that the officer, after discovering the three reels of film and making an inspection thereof, did not seek to enlist the aid of a qualified magistrate to make oath to him what he had seen, and to secure an adjudication by such magistrate that the films were obscene, so that at least the semblance of judicial authority would have been obtained so as to authorize the seizure of the films. Instead, the officer called the Solicitor General, whose duty it is to prosecute, and was advised to use "his own judgment" as to whether the films were obscene.

At what stage of the proceedings in this case did the films become obscene, so as to remove them from the constitutionally protected realm of the First Amendment, and place them in the unprotected area of "obscenity" as held in *Roth v. United States*, 354 U.S. 476? Were they obscene when the appellant first came into possession of them, if he ever did? Were they obscene when the officer first viewed them, or when he reported his findings to the Solicitor General? Did they become obscene when the Chairman and members of the Literature Commission viewed them, or did they only become obscene when the jury in this case returned its verdict finding the appellant guilty of possessing obscene articles?

What is obscenity, and how has it been defined by the courts? Did the appellant know that it was obscene before he had himself viewed it? Was the appellant able to apply the same contemporary community standards as those who later testified at the trial in making his determination that the films were obscene? All these questions, and many more, come to mind in now trying to second guess whether the officer, in making such a

determination, was applying the same standards and criteria as to those in which the appellant was asked when the films were seized.

The appellant urges that inasmuch as such a thin line exists between obscenity and non-obscenity that no one article is either all white or all black, so that a mere ministerial officer of the law, engaged in the competitive enterprise of ferreting out crime, may not be authorized to substitute his judgment for that of the appellant and make a determination, on the spot, that the films found in the desk drawer of the appellant's home were to be classified as *obscene*.

The motion to suppress the films as evidence should have been sustained, and the holding by the Georgia Supreme Court that no question of freedom of speech or of the press is involved is error.

APPENDIX

Appended hereto is a complete copy of the opinion and judgment of the Supreme Court of Georgia from which the appeal was taken in this case.

Also appended hereto is a verbatim copy of the Georgia statute to which the appeal has been taken in this case.

Apr. 9, 1968

IN THE SUPREME COURT OF GEORGIA.

24484. STANLEY v. THE STATE 708

FRANKUM, Justice. Robert E. Stanley was convicted of the offense of possessing obscene matter under an indictment framed under the provisions of Code § 26-6301. He appealed. Jurisdiction of the appeal is in this court by reason of two attacks by demurrer upon the constitutionality of the law under which the defendant was indicted and tried. The demurrer was overruled by the trial court and the appellant enumerates that judgment and other rulings of court as error. We will deal with the enumerations of error in the order in which they are made.

1. Appellant made a motion to suppress evidence to-wit: the three rolls of motion picture film seized by the officers while conducting a search of the appellant's premises. It appeared that special agents of the intelligence division of the U. S. Internal Revenue Service and an investigator from the Solicitor General's Office of Fulton County, acting under authority of a Federal Search Warrant issued by the U. S. Commissioner authorizing the search of the defendant's dwelling for certain bookmaking records particularly described in the warrant, while conducting the search discovered three rolls of motion picture film in the bedroom of the defendant, placed said film in a projector, showed said pictures and observed that said films depicted nude men and women engaged in acts of sexual intercourse and sodomy. The investigator seized said films as being contraband obscene matter possessed by the defendant in violation of Sec. 26-6301 of the Georgia Code

as amended and placed the defendant under arrest on that charge. The defendant moved to suppress the evidence on the ground that its seizure violated his constitutional rights in that it was seized under a warrant not specifically describing the thing to be seized, and before this court he relies principally upon the case of Marcus v. Search Warrant, 367 U.S. 717 (____ L. Ed.____, ____ Sup. Ct. ____). That case is clearly distinguishable from this case. The basis of the decision in that case was that the warrant under which the seizure of the lewd and pornographic material was had was not specific as to any property to be seized and was therefore a void warrant. Thus the search and seizure there was illegal ab initio. In this case it was specifically held by the trial court, in overruling the motion to suppress, that the warrant and the search thereunder were legal, and in so ruling the trial court committed no error. In Georgia "when the peace officer is in the process of effecting a lawful search," he may discover or seize "any stolen or embezzled property, any item, substance, object, thing or matter, the possession of which is unlawful, or any item, substance, object, thing or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of the State of Georgia." (Ga. L. 1966, pp. 567, 568; Ga. Code Anno. Suppl. Sec. 27-303 (e). Such seizure as was had in this case has been expressly held not to be a violation of constitutional guarantees either State or Federal. Cash v. State, 222 Ga. 55, 58 (____S.E.____); Harris v. U. S., 331 U.S. 145 (____L.Ed____, Sup. Ct.____); Palmer v. U. S. (CCA, DC), 203 Fed. 2d 66; Johnson v. U.S. (CCA,

DC), 293 Fed. 2d 539; U. S. v. Eisner (CCA 6) 297 Fed. 2d 595).

Even if it be said that the ruling made in the Marcus case is, in terms, broad enough to encompass the seizure of the lewd, lascivious and pornographic material involved in this case, it must be observed that the ruling made in that case was made with relation to and in the context of Constitutional guarantees of freedom of the press and freedom of speech. Here no such question is involved. There is no merit to the appellant's contention in this regard and the trial court did not err in overruling the motion to suppress the evidence.

2. The indictment in this case which charged that the defendant on a specified date "did knowingly have possession of obscene matter," thereafter describing three rolls of motion picture film in detail and concluding with the allegation: "said accused having knowledge of the obscene nature of such motion picture film and matter; said motion picture films when considered as a whole and applying contemporary community standards that exist in this county, being obscene matter whose predominant appeal is to a shameful and morbid interest in nudity and sex; and accused should reasonably have known of the obscene nature of said matter, said act of accused being contrary to the laws of said state, the good order, peace and dignity thereof," sufficiently charged the defendant with an offense under the provisions of Code Sec. 26-6301, as amended by the act approved March 13, 1963 (Ga. L. 1963, p. 78 et seq.). It is not essential to an indictment charging one with possession of obscene

matter that it be alleged that such possession was "with intent to sell, expose or circulate the same."

3. The contention that the act approved March 13, 1963, is unconstitutional, null and void on its face in that it was passed and enacted by the general assembly of Georgia as an amendment to a code section which had previously been declared to be unconstitutional (Simpson v. State 218 Ga. 337 (.... S.E.....) is without merit. Section 1 of the 1963 Act clearly states that "Code Chap. 26-63 . . . as amended, particularly by an Act approved March 17, 1956 (Ga. L. 1956, p. 801), is hereby amended . . ." The 1956 Act had in a similar fashion amended Chapter 26-63 by striking therefrom Code Sec. 26-6301 and inserting in lieu thereof a new section to be numbered Section 26-6301 and it was that section as reenacted in 1956 which was held to be unconstitutional in Simpson v. State supra. The fact that the 1963 Act particularized the portion of Code Chap. 26-63 to be amended and referred to Sec. 26-6301 and further provided that the Chapter, should be amended by striking that code section in its entirety (which was the effect of this court's ruling in the Simpson case) in no way vitiated the effect of the act to amend Code Chap. 26-63.

4. Defendant contended in the 3rd ground of his general demurrer to the indictment that the law under which he was indicted is unconstitutional, null and void as in conflict with the first and 14th Amendments to the Constitution of the United States guaranteeing freedom of the press and due process of law in that it seeks to punish persons charged with the violation of the law if they reasonably should

know of the obscene nature of such matter, it being contended that the requirement of reasonable knowledge would withdraw the element of scienter from the definition of the offense and would render a person guilty without actual knowledge of the obscene nature of the matter. This contention is without merit. As we construe the statute the language "if such person has knowledge or reasonably should know of the obscene nature of such matter," merely amounts to a statutory expression of a rule of evidence which has been extant in this state over many years. Whether a person has knowledge of a fact is a matter peculiarly within the mind of such person, and it is rarely if ever that the defendant's guilty knowledge is susceptible of direct proof. For this reason this court has adhered to the principle that guilty knowledge may be shown by circumstances as well as by actual and direct proof. Rivers v. State, 118 Ga. 42 (2) (____S.E.____); Birdsong v. State, 120 Ga. 850, 852 (3) (____S.E.____). Therefore, if the evidence shows that the defendant knowingly possessed matter which is obscene and that he reasonably should have known of its obscene nature, and this latter fact is shown by circumstances relating to the way and manner in which he came into the possession of the matter or relating to the length of time he has had possession of it, coupled with a showing that such defendant is sufficiently informed as to the community standards as to be chargeable with knowledge of the obscene nature of the matter then he can be convicted even though direct proof of his actual knowledge of the obscene nature of the matter is incapable of being produced. The statute is therefore not unconstitutional for any of the rea-

sons urged and the trial court did not err in overruling the general and special demurrers of the defendant in which sought to raise this issue.

5. Appellant filed a plea in abatement in which he made the contention that since the matter he was charged with possessing had not been declared to be obscene by a court of competent jurisdiction in accordance with the provision of the act approved March 3, 1964 (Ga. L. 1964, p. 161-65; Code Ann. Suppl. Chap. 26-63A) as required by Section 2 of the Act approved April 1, 1965 (Ga. L. 1965, p. 489) that he could not be prosecuted for merely possessing the films in question. This contention is without merit. The provisions of Section 2 of the Act of 1965 apply only to that act, that is, to the provisions of Section 1 of the 1965 Act which added a new section to be known as Code Sec. 26-6301.1 and those provisions do not apply to Code Sec. 26-6301 under which the appellant was prosecuted. Furthermore the provisions of the 1965 Act apply only to pornographic literature, and the matter for the possession of which the defendant was prosecuted in this case was in no sense literature as that term is defined by recognized authorities. See, for example, Websters New World Dictionary of the American Language, p. 856.

6. The evidence authorized the verdict and no error of law appearing the judgment will be affirmed.

Judgment affirmed. All the Justices concur.

24484

SUPREME COURT OF GEORGIA

Atlanta, April 9, 1968.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Robert Eli Stanley v. The State.

This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of Costs, $30.00

CRIMES – SALE, POSSESSION, ETC. OF OBSCENE MATTER.

Code § 26-6301 Amended.

No. 53 (House Bill No. 132).

An Act to amend Code Chapter 26-63, relating to obscene pictures and abusive and vulgar language, as amended, particularly by an Act approved March 17, 1956 (Ga. L. 1956, p. 801), so as to provide that any person who shall knowingly bring, or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print, any obscene matter

with intent to sell, expose, or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years; to provide that upon the recommendation of the jury, said offense may be punished as for a misdemeanor; to provide for definitions; to provide for severability; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Code Chapter 26-63, relating to obscene pictures and abusive and vulgar language, as amended, particularly by an Act approved March 17, 1956. (Ga. L. 1956, p. 801), is hereby amended by striking Code section 26-6301 in its entirety, and inserting in lieu thereof a new section 26-6301 to read as follows:

"26-6301. Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years; provided, however, in the event the jury so

recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion."

Section 2. In the event any section, subsection, sentence, clause or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses or phrases of this Act, which shall remain of full force and effect, as if the section, subsection, sentence, clause or phrase so declared or adjudged invalid or unconstitutional was not originally a part hereof. The General Assembly hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional.

Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 13, 1963.

CONCLUSION

The questions involved in this appeal are substantial and of gravity and importance. If any of the questions have been improvidently taken by this appeal where the proper mode of review is by petition for certiorari, appellant requests this appeal and the papers whereon the appeal was taken be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.

28 U.S.C.A. No. 2103
Com. of Pa. v. Bd. of Dir. of City Trust of Phila.
353 U.S. 230.

Respectfully submitted,

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